U.S. Department of Labor

Office of Administrative Law Judges
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MAILED: 1/19/2001

IN THE MATTER OF:	
Elizabeth A. Pringer (Widow of John J. Pringer, Jr.) Claimant	
Against	Case No.: 2000-LHC-0003
	OWCP No.: 1-145323
General Dynamics Corporation Employer/Self-Insurer	
and	
Director, Office of Workers' Compensation Programs, United States Department of Labor Party-in-Interest	

APPEARANCES:

Stephen C. Embry, Esq.
Melissa M. Olson, Esq.
For the Claimant

Mark W. Oberlatz, Esq.
For the Employer/Self-Insurer

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on April 27, 2000 in New London, Connecticut, at which time all parties were given the opportunity to present

evidence and oral arguments. Post-hearing briefs were not requested herein. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
CX 7	Claimant's September 9, 1999 deposition testimony	04/28/00
RX 6	Deposition Notice relating to the taking of the deposition of J. Bernard L. Gee, M.D.	05/05/00
CX 8	Attorney Olson’s letter filing the	05/15/00
CX 9	Notices relating to the taking of the deposition of Edwin Newman	05/15/00
CX 10	Attorney Olson’s letter filing the	05/30/00
CX 11	Original Transcript of the May 12, 2000 deposition of Mr. Newman	05/30/00
RX 7	Attorney Oberlatz’s letter filing	06/08/00
RX 8	Decedent’s master personnel records	06/08/00
CX 12	Attorney Embry’s letter filing his	06/29/00
CX 13	Fee Petition	

RX 8A	Employer’s comments thereon	06/29/00
RX 9	Attorney Oberlatz’s letter filing	08/18/00
RX 10	Dr. Gee’s **Curriculum Vitae**	08/18/00
RX 11	September 6, 1995 Surgical Pathology Report	08/18/00
RX 12	Decedent’s November 3, 1991 chest x-ray report	08/18/00
RX 13	May 19, 2000 Original Transcript of Dr. Gee’s deposition testimony	08/18/00

The record was closed on August 18, 2000 as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Decedent and the Employer were in an employee-employer relationship at the relevant times.

3. On November 9, 1995 Decedent passed away.

4. Claimant gave the Employer notice of her husband's injury and death in a timely fashion.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The parties attended an informal conference on June 23, 1999.

7. The applicable average weekly wage is $391.22, the National Average Weekly Wage as of the date of death.

8. The Employer has paid no benefits herein.

The unresolved issues in this proceeding are:

1. Whether Decedent was exposed to asbestos in the course of his maritime employment.

2. Whether Decedent's lung cancer is causally related to his maritime employment.

3. If so, whether he passed away because of such injury.

4. Claimant's entitlement to Death Benefits, interest on past due benefits and payment of any unpaid medical bills related to Decedent's alleged work-related injury.

5. Whether Decedent's son, David, is entitled to survivor's benefits.

6. Section 8(f) of the Act has been withdrawn as an issue herein.

SUMMARY OF THE EVIDENCE

John J. Pringer, Jr. ("Decedent" herein), who was born on February 1, 1924 and who had an employment history of manual labor, began working on September 6, 1962 as a planner at the Groton, Connecticut shipyard of the Electric Boat Corporation, then a division of the General Dynamics Corporation ("Employer"), a maritime facility adjacent to the navigable waters of the Thames River where the Employer builds, repairs and overhauls submarines. As a planner Decedent did a "lot of inventory control" and "for a long time his office was right down in the yard," Claimant remarking, "And he had to go in and out of the boats a lot." Decedent went on the boats daily and, at the end of the day when he came home from work, his clothes would "be dirty" and Claimant would "just wash them." Decedent did not discuss with Claimant his specific job duties, apparently because of U.S. Navy/Department of Defense regulations relating to the disclosure of classified information, especially as nuclear submarines form the bulwark of the U.S. Armed Forces, and Claimant was unable to testify as to whether Decedent had been exposed to asbestos or other pulmonary irritants at the shipyard. Decedent worked twenty-four (24) years in the Planning Department and he took an "early retirement" on January 31, 1986, taking advantage of the Employer's so-called "golden handshake." He did not retire because of any physical problems and, according to Claimant, Decedent "was a very happy retiree." (CX 7 at 3-8)

Decedent, who worked four or five years, part-time three days a week, at a local department store solely to keep busy, began to experience breathing problems in 1994 and Claimant noticed that just about any physical exertion caused him to be

short of breath. Decedent was usually reluctant to go see a doctor for any problem but he finally decided to got to the Montville Health Clinic to have his pulmonary condition evaluated. X-rays showed a problem in his lungs and he was sent to Dr. Deren, a pulmonary specialist, for further tests; these tests showed a suspicious mass in his lungs, a tumor which turned out to be malignant. Decedent underwent chemotherapy and radiation and his condition rapidly deteriorated. Dr. Deren did not tell Claimant the etiology of that tumor but "he might have said it to my husband." Claimant spoke to Dr. Deren "only once" but she did testify that "he (the doctor) did think so," **i.e.**, that the tumor might be work-related. Decedent was seen by Dr. Slater "a couple of times." Decedent had "a very, very slight small stroke" in 1991, was hospitalized at the Backus Hospital and released the next day. He recovered completely from that stroke with no paralysis or residual disability. Decedent also suffered from a peptic ulcer and several attacks of the gout "quite a few years back." He had no cardiac problems, Claimant remarking that her husband "was a pretty healthy guy." He did smoke cigarettes "when he was in the service and when we were first married (on November 8, 1947) (CX 2), but "he gave them up... (a)bout 30 or 40 years ago." (CX 7 at 9-16)

Decedent passed away on November 9, 1995 and Dr. Beth Herrick has certified as the immediate cause of death "cardio-pulmonary arrest" due to or as a consequence of "lung cancer." (CX 4) Claimant was living with Decedent at the time of his death and she has not remarried. (TR 19-25)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its

provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, **supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, **supra**. Once claimant

establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes, supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents substantial evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that her husband experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm if the record establishes that a work accident occurred which could have caused the harm, thereby invoking the Section 20(a) presumption. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general

contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which negates the connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not negate the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which negates the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated

the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Amos v. Director, OWCP**, 153 F.3d 1051 (9th Cir. 1998), **amended**, 164 F.3d 480, 32 BRBS 144 (CRT) (9th Cir. 1999).

The U.S. Court of Appeals for the First Circuit has considered the Employer's burden of proof in rebutting a **prima facie** claim under Section 20(a) and that Court has issued a most significant decision in **Bath Iron Works Corp. v. Director, OWCP (Shorette)**, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997).

In **Shorette**, the United States Court of Appeals for the First Circuit held that an employer need not totally rule out any possible causal relationship between a claimant's employment and his condition in order to establish rebuttal of the Section 20(a) presumption. The court held that employer need only produce substantial evidence that the condition was not caused or aggravated by the employment. **Id.**, 109 F.3d at 56,31 BRBS at 21 (CRT); **see also Bath Iron Works Corp. v. Director, OWCP [Hartford]**, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998). The

court held that requiring an employer to rule out totally any possible connection between the injury and the employment goes beyond the statutory language presuming the compensability of the claim "in the absence of substantial evidence to the contrary." 33 U.S.C. §920(a). **See Shorette,** 109 F.3d at 56, 31 BRBS at 21 (CRT). The totally "ruling out" standard was recently addressed and rejected by the Court of Appeals for the Fifth and Seventh Circuits as well. **Conoco, Inc. v. Director, OWCP [Prewitt]**, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); **American Grain Trimmers, Inc. v. OWCP**, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); **see also O'Kelley v. Dep't of the Army/NAF**, 34 BRBS 39 (2000); **but see Brown v. Jacksonville Shipyards, Inc.**, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990) (affirming the finding that the Section 20(a) presumption was not rebutted because no physician expressed an opinion "ruling out the possibility" of a causal relationship between the injury and the work).

In the case at bar, Claimant alleges that her husband's lung cancer resulted, in part, from his exposure to and inhalation of asbestos dust and fibers at the Employer's shipyard. On the other hand, the Employer submits (1) that Decedent was not exposed to asbestos at the shipyard and (2) that his lung cancer is due **solely** to his extensive cigarette smoking history.

As the Employer has presented substantial evidence severing the connection between the alleged bodily harm, **i.e.**, lung cancer, and his maritime employment, the presumption falls out of the case, does not control the result and I shall now weight and evaluate all of the record evidence.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v.**

Coast Marine Construction, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should become have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

In the case at bar, the record reflects the September 29, 1995 Summary of Dr. Michael M. Deren and I find most significant the history report given to the doctor at the time of the admission (RX 2):

OPERATIVE PROCEDURES: 9/26/95 - Chest tube insertion, pericardial window.

HISTORY: This 71 year-old white male was admitted to the hospital with left pleural effusion, pericardial effusion. The patient is a long-term smoker, 1 to 2 packs of cigarettes per

day and had worked at EB for 30 years as a planner and apparently had no exposure to asbestos at the shipyard. He was hospitalized in 1991, with a right hemiparesis secondary to a left cerebral stroke and is fully resolved. He has been treated with aspirin alone. Over the past year he had noted increasing shortness of breath, decreased appetite and 10 to 15 pound weight loss. He was evaluated for weakness and shortness of breath at the Mountfield Health Clinic 3 weeks ago. Chest x-ray showed white out of the left lung. He was then referred for further evaluation and treatment. He was admitted to the hospital...

... The echocardiogram prior to this showed a large tumor rising from the left mainstem bronchus extending into and occupying most of the volume of the left atrium and a large pericardial effusion with mild tamponade. His chest x-ray showed the white out. His chest CT scan showed a complex mass in the left hilum obstructing the left lower lobe bronchus with leftward mediastinal shift and with left lower lobe atelectasis, a large left pleural effusion, a large pericardial effusion and mediastinal adenopathy. The right lung was clear. He noted marked improvement in his symptomatology following release of his pericardial tamponade. The results of this however did not demonstrate evidence for tumor. Initially but subsequent diagnosis demonstrated squamous cell carcinoma.

The patient was extremely anxious to leave and as a consequence, his chest tube was removed and he was allowed to go home. He was seen prior to discharge by Dr. Peschel. He was placed on hospice. It was felt that he would have some chemotherapy and/or radiation therapy depending upon the patient's wishes and coordination with Dr. Slater. His pericardial biopsy and pericardial fluid showed pericardial tissue with mesothelial cell hyperplasia, chronic inflammation, hyperplastic lymph nodes, the xiphoid with hematopoietic bone marrow elements. The pericardial fluid block which was negative for malignancy. A whole body bone scan showed no evidence of abnormalities. The exact tissue diagnosis was not known at the time of discharge but he was to be followed up by Dr. Slater and have either a lung biopsy or further biopsy to document the tissue type. He was then discharged to be followed up in the office.

DISCHARGE DIAGNOSES:

1. Locally advanced squamous cell carcinoma of the lung.

2. Chronic obstructive pulmonary disease.

3. Post status left cerebrovascular accident, 1991, without neurologic residual.

4. History of gout.

5. Pericardial effusion.

I also note that Dr. Mandeep S. Dhami took the following personal and social history from the Decedent at the time of his October 3, 1995 admission to L & M Hospital for chemotherapy and radiation therapy (RX 3):

PERSONAL & SOCIAL HISTORY: The patient lives in Montville with his wife. He works at Electric Boat but has not had any exposure to asbestos. He drinks alcohol occasionally. He has two sons who live locally. There is no family history of any cancer. He is a smoke o (sic). He has two sons who live locally. There is no family history of any cancer. He is a smoker of one to two packs per day for the past 60 years.

FAMILY HISTORY: Negative for any cancer in the immediate family.

REVIEW OF SYSTEMS: Essentially as per history of present illness.

The doctor gave this (RX 3):

IMPRESSION:

1. Locally advanced, poorly differentiated squamous cell carcinoma of lung involving left main stem bronchus with direct extension into pericardium and left atrium with left lung atelectasis and pleural effusion.

2. Chronic obstructive pulmonary disease.

3. History of tobacco abuse.

4. History of gout.

5. Prior history of stroke, completely resolved.

According to the doctor, the pros and cons of combined radiotherapy have been discussed with the patient previously by Dr. Slater and Dr. Peschel. I briefly went over the common toxicities associated with combined radiotherapy including the unusual toxicities of chemotherapy agents and the combination thereof. The patient is agreeable to initiation of treatment and will be started on treatment today.

The record also contains the September 26, 1995 Consultation Report of Dr. Dennis Slater wherein the doctor took the following history report (RX 1):

The patient is a 71 year-old white male with a poorly differentiated squamous cell carcinoma involving the left main stem bronchus, pericardial and left pleural effusions, for evaluation. The patient is a long term smoker of 1-2 packs per day for the past 60 years. He worked at Electric Boat for 30 years as a planner, but had no exposure to asbestos in the shipyard. He was hospitalized in 1991 for a right hemiparesis secondary to a left cerebral stroke, which fully resolved, and was treated with aspirin alone. Over the past year he has noted worsening exertional dyspnea, slight diminution in his appetite, and a 10-15 pound weight loss. He was evaluated for weakness and shortness of breath at the Montville Health Clinic 3 weeks ago. Chest x-ray showed a withe-out of the left lung field. ABG on room air - 7.44, pCO2 41, pO2 80. Fiberoptic bronchoscopy on 09/06/95 revealed a near-total occlusion of the left mainstem bronchus, 1 cm from the carina. The trachea and right-sided bronchi were normal. Biopsies revealed a poorly differentiated squamous cell carcinoma... Chest CT scan on 09/25/95 showed a complex mass in the left hilum obstructing the left lower lobe bronchus, left-ward mediastinal shift with left lower lobe atelectasis, large left pleural effusion, a large pericardial effusion and mediastinal adenopathy. The right lung was clear. Cranial CT scan and abdominal CT scan were negative for metastatic disease. An echocardiogram this morning showed a large tumor arising from the left mainstem bronchus, extending into and occupying most of the volume of the left atrium and a large pericardial effusion with mild tamponade.

Today, the patient claims to be comfortable at rest and specifically denies any chest pain, cough or sputum production, hemoptysis, or back pain. He admits to less than one block and one flight DOE (dyspnea on exertion). He denies any shortness of breath with change in positive or Valsalva maneuvers, dysphagia, hoarseness, dizziness or syncope. The DOE and weight loss have been very slowly progressive over one year and he denies any acute symptoms over the past few weeks...

Past medical history is remarkable for a probable left middle cerebral artery stroke presenting with mild right hemiparesis in 1991, which fully resolved; gouty arthritis involving the left first toe, inactive on Allopurinol.

The patient lives with his wife in Montville,

> Connecticut. He works at EB as above but without exposure to asbestos, according to the doctor.

Dr. Deren issued the following supplemental report on April 29, 1999 (CX 5):

> This is in response to you inquiry of 4/15/99 regarding Mr. Pringer. You wish to know whether in light of his history having worked next to individuals who were installing and removing asbestos, and the fact that he was exposed to airborne asbestos would be a contributing factor in the development of his lung cancer.
>
> It seems reasonable since he did inhale asbestos he had some component of asbestosis. People with asbestosis have a higher incident of lung cancer, especially if they smoke as Mr. Pringer did. **Hence his asbestos exposure and presumed asbestosis would be a contributing factor in his lung cancer development.** (Emphasis added)

The record also contains the January 17, 2000 report of Dr. Arthur C. De Graff, Jr., Claimant's pulmonary expert, wherein the doctor states as follows (CX 1):

"Thank you for asking me to review the records of John Pringer. You indicate that Mr. Pringer worked as a planner for the Electric Boat Division of General Dynamics from 1957 through 1987 and that during his career as a planner he had extensive exposure to asbestos until the mid-1970s. The exposure to asbestos was a consequence of the necessity that Mr. Pringer would be on submarines on a regular basis. Your impression that he had significant asbestos exposure is in keeping with my experience in interviewing many General Dynamics employees whose job description was "planner." **The atmosphere on the submarines during construction and retrofitting was such that anyone working on the boats, whether as a lagger (insulator) who was directly working with asbestos or as a bystander, would inhale significant asbestos dust.** Apparently Mr. Pringer denied asbestos exposure when questioned by Dr. Michael Deren at the time of his admission to Lawrence and Memorial Hospital on 9/5/95. **I would take this to simply mean that Mr. Pringer was not working directly with asbestos** but, as noted above, if he were working on the boats during construction or retrofitting, **he would have been exposed to significant asbestos dust...** (Emphasis added)

"Prior to the mid-1970s, the air on submarines during construction or in the process of retrofitting was severely contaminated by asbestos dust throughout the submarines.

Workers were neither offered nor required to wear protective masks of any sort. Workers, either insulators or pipefitters who directly worked with asbestos, or those who were merely bystanders on submarines at that time were subject to extensive asbestos dust exposure. After the mid-1970s, asbestos dust abatement procedures were put in place by Electric Boat with the consequence that asbestos exposure by Electric Boat workers was markedly diminished. Mr. Pringer worked at Electric Boat in the interval from 1957 through 1975 during which time no abatement procedures were in place and asbestos dust exposure was extensive. I am sure you will find on examination of his work records that he spent considerable time on the submarines during this time. **Assuming this to be the case, he would have had extensive asbestos exposure.** (Emphasis added)

"He was also a smoker and smoked 1-2 packs of cigarettes a day for 60 years, according to Dr. Dhami's history of 10/4/95. Asbestos particles are adsorptive and by that adsorptive action concentrate inhaled cigarette tars containing carcinogens. They are also irritative and by their presence in lung tissue cause local scar tissue to form. **The effect of scar tissue alone is known to increase the incidence of lung cancer, but combined with increased concentrations of carcinogens from cigarette smoke the incidence of lung cancer is markedly increased in smokers who have also had asbestos exposure as compared to smokers who have never had asbestos exposure. The incidence of cancer among asbestos-exposed individuals show are smokers is approximately five times the incidence of cancer among persons who do not have excessive asbestos exposure.** (Emphasis added)

"Thus **Mr. Pringer's exposure to asbestos was a significant contributing factor to the development of his lung cancer and to his death.**" (Emphasis added)

The record also contains the September 8, 1995 Summary Report of Dr. Michael M. Deren wherein the doctor states as follows (CX 6):

DISCHARGE MEDICATIONS: Allopurinol and one baby aspirin per day.

OPERATIONS AND PROCEDURES: Were 9/6/95 bronchoscopy and biopsy.

This 71-year-old white male was admitted to the hospital with shortness of breath for 2-3 months and a white-out of the left lung. The patient denied chest pain or fever, but did have a 13 pound weight loss. He also had a nonproductive cough, generalized fatigue, but no hemoptysis or cardiac symptomatology... He has difficulty climbing a flight of stairs due to shortness of breath. He has become more limited in his activity over the last year. He had a left-sided cerebro-vascular accident in 1991 with a resolved right-sided weakness.

He has had gout for twenty years with symptoms in his left first toe and a history questionably of a left carotid arterial disease. He had a peptic ulcer diagnosed in 1980 but denies hypertension, diabetes, or heart problems. **He worked but had no ship yard exposure to dust or asbestos**. He had a tonsillectomy at age four. Medications include: Allopurinol 400 mg daily, one baby aspirin daily, and Tagamet on an as needed basis. He has been a cigarette smoker up to two packs per day over the last sixty years. Recently, he is down to about one pack per day... (Emphasis added)

The findings were those of severe obstructive disease no bronchodilator response, mild to moderately severe restrictive disease and a DLCO that was severely decreased to 40% of predicted. Due to the scheduling difficulty, the patient was discharged. He was aware of his diagnosis, the family was certainly aware of the diagnosis of cancer. They wish to go home and think about what he wanted to do. The family and the patient realize that they should come and follow-up visit for further evaluation and possible therapy, either surgical, radiation or chemotherapy for his cancer of the lung.

The record also contains the October 29, 1999 report of Dr. J. Bernard L. Gee, the Employer's pulmonary expert and the doctor states as follows (RX 4):

This gentleman died on November 9, 1995 aged 71 from lung cancer. He presented with a "white out" of the L. lung and biopsy showed a poorly differentiated squamous cell lung cancer. CT scan revealed a L. hilar mass, atelectasis pleural effusion and a mediastinal mass, with pericardial involvement. There was little shortness of breath at that time. He received chemoradiotherapy and pericardial drainage. Other illnesses include a mild stroke and gout.

Exposure History: An EB employee for 25 years and one-two ppd smoking for 60 years, with several references to 2 ppd in physician's notes.

X-Ray Reports: None note asbestosis or pleural plaques, though a L. lateralized pleural effusion was noted (10/4/95). A normal chest film on 11/3/91. PFTs 9/6/98 show severe loss of flow rates lung volumes and DL of a time when L. lung is essential functionless from the tumor/effusion. There is also some airflow obstruction, mid-flow at 15%.

Opinion:

As regard the lung cancer:

a. This cancer should be ascribed to smoking, at least 50

pack/years; implying about a 40 fold lung cancer risk. The studies of Synder (ACS) noted in Surgeon General's report give a relative lung cancer risk of at least 50 fold at 60 pack years. This effect is enhanced by the use of non-filters. These views are set forth by Shopland (JCNI 83, 1142, 1991) and a recent NIH (NCI) publication 97-4213, 1987. The harmful effects of tar contents are addresses by Zang and Wynder (Cancer; 70-69, 1995).

b. The risk of lung cancer in "asbestos workers" without smoking adjustments, in the latest Selikoff report is 3 and similar in the large recent British studies. After smoking adjustment, employing an estimated overall smoking relative risk of only 20, the report indicates a risk of 2 or less, in a series with both asbestosis and mesothelioma. The above figures are overall results in which insulators and historical construction workers are included. We stress that many sub-groups of asbestos workers show little or no excess lung cancers. For instance non-textile chrysotile using workers show no risk! This is set forth in the Ann. Occ. Hygiene report which includes a summary of the data on friction product workers who show NO excess lung cancers. Other studies indicate a threshold below which no excess lung cancers occur are indicated in the Morgan and Gee chapter and by the writings of Browne. However, for the above reason we presently consider the lung cancer risk from asbestos exposure alone to be absent in the present case.

c. As regard asbestosis and lung cancer, I believe there are sound reasons for this cancer. These are again summarized in our chapter and include the following considerations. First, the excess lung cancers occur in those with abnormal chest radiographs. Second, in studies conducted at Yale - there is an association between the inflammatory cells in the aveoloi and the para-neoplastic squamous metaplasia observed by bronchial biopsy in asbestos workers. Third, asbestos fibers certainly produce both cell growth stimulating factors and carcinogenic oxidizing free radicals. Fourth, asbestos fibers predominate in the bronchiolar-alveolar tissues with few in the large airways (Churg, **BJM**, 501355, 1993) where many lung cancers arise. Fifth, the greatest excess lung cancer occurs in cohorts with much asbestosis. Sixth, there is directly relevant evidence from three pathology studies. The two retrospective studies showed that in cases with lung cancer, 90-100% showed pulmonary asbestosis (Kipen, **BJM** 44-96, 1987) leaving no room for any cases without asbestosis among the remaining workers (Newhouse, **BJM**, 46:637, 1993). Seventh, there is little or no evidence in the Quebec population living around the asbestos mines of an increased

lung cancer risk in spite of the local ambient air containing fiber levels several hundred fold higher than those of N. America urban dwellers (McDonal, **Env. Health Prespec.** 62:319, 1985)

d. As regards synergism between smoking and lung cancer, this was an historic notion based on a few cohorts in which statisticians usually stated "synergism cannot be excluded." Of itself, this is hardly proof! Moreover, it applies only to few historic cohorts, but not to most older studies. It requires for its validity an accurate knowledge of the lung cancer risks in life-long non-smokers; such data, Berry notwithstanding, does not exist because, as Selikoff pointed out in 1972 - he had never seen lung cancer in non-smokers! Furthermore, current data simply does not support the synergism notion, **though it is reasonable to regard asbestosis and smoking as "co-conspirators.**" Dr. Selikoff's report of synergism (3/12/89) was doubtful when first proposed by Selikoff in 1965. It is no longer valid and should not be cited as relevant to the contemporary scene. (Emphasis added)

To conclude, I consider this lung cancer should be ascribed to smoking and asbestos exposure was not a factor.

Dr. Gee reiterated his opinions at his May 19, 2000 deposition (RX 13) and noteworthy is the fact that the doctor did not review Decedent's chest x-rays and CT scan, just the report of the radiologists. (RX 13 at 18-19, 24) Again I note the doctor was reluctant to answer certain key questions asked by Claimant's attorney; instead the doctor several times turned key questions around to his point of view. **See**, **e.g.**, RX 13 at 19-39, 40-43) In fact, Dr. Gee was even reluctant to admit that the prominent changes seen on Decedent's right lower lobe on his chest x-ray could be a sign of interstitial fibrosis or plaques, a "marker" of prior asbestos exposure. (RX 13 at 22-24) While Dr. Gee would not admit Decedent had a restrictive disease of the lungs, he did admit Decedent "had restrictive chest wall disease." (RX 13 at 24-25) Noteworthy is the fact that Dr. Gee saw no signs of an emphysematous disease in an individual with a smoking history of at least 40 pack years, and perhaps as much as 60 pack years. (RX 13 at 27)

This closed record conclusively establishes, and I so find and conclude, that Decedent's maritime employment did causally produce Decedent's lung cancer, that the date of the work-related injury is October 4, 1995 (RX 3), that the Employer had timely notice of Decedent's injury and subsequent death on November 9, 1995 (CX 4), that the Employer timely controverted Claimant's and Decedent's entitlement to benefits and that Claimant timely filed for benefits once a dispute arose between

the parties. In fact, the principal issue is the nature and extent of Decedent's disability, an issue I shall now resolve.

In so concluding, I accept and credit the well-reasoned and well-documented opinions of Dr. Deren, as reflected in his April 29, 1999 report (CX 5), and of Dr. DeGraff, as reflected in his January 17, 2000 report, that Decedent's secondary exposure to asbestos at the shipyard, together with his extensive cigarette smoking history and the synergistic effect between smoking in an asbestos-exposed worker, hastened the development of Decedent's lung cancer. Decedent's exposure to asbestos at the shipyard is established by the testimony of Edwin G. Swanson (CX 10 at 5-9) and that testimony stands uncontradicted.

While I am impressed with Dr. Gee's professional and academic qualifications (RX 10), I simply cannot accept his opinions in this case for the reasons stated above in my review of his deposition testimony. It is obvious that Dr. Gee has a point-of-view, was reluctant to answer certain key questions and, when he did answer, he usually turned the question around to reflect his point-of-view.

Accordingly, in view of the foregoing, I reiterate my conclusion that Decedent's lung cancer constitutes a work-related injury.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Average Weekly Wage

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee

or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. **Todd Shipyards Corp. v. Black**, 717 F.2d 1280 (9th Cir. 1983); **Hoey v. General Dynamics Corporation**, 17 BRBS 229 (1985); **Pitts v. Bethlehem Steel Corp.**, 17 BRBS 17 (1985); **Yalowchuck v. General Dynamics Corp.**, 17 BRBS 13 (1985).

The 1984 Amendments to the Longshore Act apply in a new set of rules in occupational disease cases where the time of injury (**i.e.**, becomes manifest) occurs after claimant has retired. **See Woods v. Bethlehem Steel Corp.**, 17 BRBS 243 (1985); 33 U.S.C. §§902(10), 908(C)(23), 910(d)(2). In such cases, disability is defined under Section 2(10) not in terms of loss of earning capacity, but rather in terms of the degree of physical impairment as determined under the guidelines promulgated by the American Medical Association. An employee cannot receive total disability benefits under these provisions, but can only receive a permanent partial disability award based upon the degree of physical impairment. **See** 33 U.S.C. §908(c)(23); 20 C.F.R. §702.601(b). The Board has held that, in appropriate circumstances, Section 8(c)(23) allows for a permanent partial impairment award based on a one hundred (100) percent physical impairment. **Donnell v. Bath Iron Works Corporation**, 22 BRBS 136 (1989). Further, where the injury occurs more than one year after retirement, the average weekly wage is based on the National Average Weekly Wage as of the date of awareness rather than any actual wages received by the employee. **See** 33 U.S.C. §910(c)(2)(B); **Taddeo v. Bethlehem Steel Corp.**, 22 BRBS 52 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 46 (1989). Thus, it is apparent that Congress, by the 1984 Amendments, intended to expand the category of claimants entitled to receive compensation to include voluntary retirees.

However, in the case at bar, Claimant may be an involuntary retiree if he left the workforce because of work-related pulmonary problems. Thus, an employee who involuntarily withdraws from the workforce due to an occupational disability may be entitled to total disability benefits although the awareness of the relationship between disability and employment did not become manifest until after the involuntary retirement. In such cases, the average weekly wage is computed under 33 U.S.C. §910(C) to reflect earnings prior to the onset of disability rather than earnings at the later time of awareness. **MacDonald v. Bethlehem Steel Corp.**, 18 BRBS 181, 183 and 184 (1986). **Compare LaFaille v. General Dynamics Corp.**, 18 BRBS 882 (1986), **rev'd in relevant part sub nom. LaFaille v. Benefits Review Board**, 884 F.2d 54, 22 BRBS 108 (CRT) (2d Cir. 1989).

Thus, where disability commences on the date of involuntary withdrawal from the workforce, claimant's average weekly wage should reflect wages prior to the date of such withdrawal under Section 10(c), rather than the National Average Weekly Wage under Section 10(d)(2)(B).

However, if the employee retires due to a non-occupational disability prior to manifestation, then he is a voluntary retiree and is subject to the post-retirement provisions. In **Woods v. Bethlehem Steel Corp.**, 17 BRBS 243 (1985), the Benefits Review Board applied the post-retirement provisions because the employee retired due to disabling non-work-related heart disease prior to the manifestation of work-related asbestosis.

Claimant was in good health at the time of his early retirement on January 31, 1986 (RX 8), worked part-time at a local department store to keep busy for four or five years and his disease was diagnosed on or about October 4, 1995.

Accordingly, Decedent is a voluntary retiree and any benefits shall be awarded based upon the National Average Weekly Wage as of October 1, 1995 as Decedent passed away on November 9, 1995. (CX 4) As of that date, the National Average Weekly Wage was $391.22.

Death Benefits and Funeral Expenses Under Section 9

Pursuant to the 1984 Amendments to the Act, Section 9 provides Death Benefits to certain survivors and dependents if a work-related injury causes an employee's death. This provision applies with respect to any death occurring after the enactment date of the Amendments, September 28, 1984. 98 Stat. 1655. The provision that Death Benefits are payable only for deaths due to employment injuries is the same as in effect prior to the 1972 Amendments. The carrier at risk at the time of decedent's injury, not at the time of death, is responsible for payment of Death Benefits. **Spence v. Terminal Shipping Co.**, 7 BRBS 128 (1977), **aff'd sub nom. Pennsylvania National Mutual Casualty Insurance Co. v. Spence**, 591 F.2d 985, 9 BRBS 714 (4th Cir. 1979), **cert. denied**, 444 U.S. 963 (1975); **Marshall v. Looney's Sheet Metal Shop**, 10 BRBS 728 (1978), **aff'd sub nom. Travelers Insurance Co. v. Marshall**, 634 F.2d 843, 12 BRBS 922 (5th Cir. 1981).

A separate Section 9 claim must be filed in order to receive benefits under Section 9. **Almeida v. General Dynamics Corp.**, 12 BRBS 901 (1980). This Section 9 claim must comply with Section 13. **See Wilson v. Vecco Concrete Construction Co.**, 16 BRBS 22 (1983); **Stark v. Bethlehem Steel Corp.**, 6 BRBS 600 (1977). Section 9(a) provides for reasonable funeral expenses not

exceeding $3,000. 33 U.S.C.A. §909(a) (West 1986). Prior to the 1984 Amendments, this amount was $1,000. This subsection contemplates that payment is to be made to the person or business providing funeral services or as reimbursement for payment for such services, and payment is limited to the actual expenses incurred up to $3,000. Claimant is entitled to appropriate interest on funeral benefits untimely paid. **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78, 84 (1989).

Section 9(b) which provides the formula for computing Death Benefits for surviving spouses and children of Decedents must be read in conjunction with Section 9(e) which provides minimum benefits. **Dunn v. Equitable Equipment Co.**, 8 BRBS 18 (1978); **Lombardo v. Moore-McCormack Lines, Inc.**, 6 BRBS 361 (1977); **Gray v. Ferrary Marine Repairs**, 5 BRBS 532 (1977).

Section 9(e), as amended in 1984, provides a maximum and minimum death benefit level. Prior to the 1972 Amendments, Section 9(e) provided that in computing Death Benefits, the average weekly wage of Decedent could not be greater than $105 nor less than $27, but total weekly compensation could not exceed Decedent's weekly wages. Under the 1972 Amendments, Section 9(e) provided that in computing Death Benefits, Decedent's average weekly wage shall not be less than the National Average Weekly Wage under Section 6(b), but that the weekly death benefits shall not exceed decedent's actual average weekly wage. **See Dennis v. Detroit Harbor Terminals**, 18 BRBS 250 (1986), **aff'd sub nom. Director, OWCP v. Detroit Harbor Terminals, Inc.**, 850 F.2d 283 21 BRBS 85 (CRT) (6th Cir. 1988); **Dunn, supra**; **Lombardo, supra**; **Gray, supra**.

In **Director, OWCP v. Rasmussen**, 440 U.S. 29, 9 BRBS 954 (1979), **aff'g** 567 F.2d 1385, 7 BRBS 403 (9th Cir. 1978), **aff'g sub nom. Rasmussen v. GEO Control, Inc.**, 1 BRBS 378 (1975), the Supreme Court held that the maximum benefit level of Section 6(b)(1) did not apply to Death Benefits, as the deletion of a maximum level in the 1972 Amendment was not inadvertent. The Court affirmed an award of $532 per week, two-thirds of the employee's $798 average weekly wage.

However, the 1984 amendments have reinstated that maximum limitation and Section 9(e) currently provides that average weekly wage shall not be less than the National Average Weekly Wage, but benefits may not exceed the lesser of the average weekly wage of Decedent or the benefits under Section 6(b)(1).

In view of these well-settled principles of law, I find and conclude that Claimant, as the surviving Widow of Decedent, is entitled to an award of Death Benefits, commencing on November 9, 1995, the date of her husband's death, based upon the

National Average Weekly Wage $391.22 as of that date, pursuant to Section 9, as I find and conclude that Decedent's death resulted from a combination of his work-related asbestos-related disease and his lung cancer, which conditions were first diagnosed and reported by Dr. Deren after Decedent's hospitalization from September 26, 1995 at the L&M Hospital. (RX 2 and RX 3) The Death Certificate certifies as the immediate cause of death, cardio-pulmonary arrest due to lung cancer (CX 4), Dr. Deren and Dr. DeGraff have opined that Decedent's pulmonary condition was a contributing factor in his eventual demise. (CX 5) Thus, I find and conclude that Decedent's death resulted from and was related to his work-related injury.

David Pringer, Claimant's and Decedent's son, who was born on September 21, 1960 and who is blind, is not entitled to survivor's benefits as Decedent was not the support of his son and as David Pringer has his own apartment and support himself by his Social Security Administration benefits. (TR 21-22) In this regard, **see Johnson v. Continental Grain Co.**, 58 F.3d 1232 (8th Cir. 1995); **Doe v. Jorka Corp. of New England**, 21 BRBS 142 (1988). **But see Mikell v. Savannah Shipyard**, 24 BRBS 100 (1990), **aff'd on recon.**, 26 BRBS 32 (1992), **aff'd mem. sub nom. Argonaut Co. v Mikell**, 14 F.3d 58 (11th Cir. 1994).

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ."

Grant v. Portland Stevedoring Company, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

The Benefits Review Board has held that the employer must pay appropriate interest on untimely paid funeral benefits as funeral expenses are "compensation" under the Act. **Adams v. Newport News Shipbuilding**, 22 BRBS 78, 84 (1989).

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer timely controverted Claimant's entitlement to Death Benefits. (TR) **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert.**

denied, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of her husband's work-related injury in a timely fashion and requested appropriate medical care and treatment. However, the Employer did not accept the claim and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Accordingly, the Employer shall pay for, or reimburse Claimant, for the reasonable, necessary and appropriate medical care and treatment relating to his lung cancer between September 5, 1995 (CX 6) and November 9, 1995, subject to the provisions

of Section 7 of the Act.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a self-insurer. Claimant's attorney filed a fee application on June 29, 2000 (CX 12), concerning services rendered and costs incurred in representing Claimant between July 15, 1999 and June 8, 2000. Attorney Stephen C. Embry seeks a fee of $6,993.29 (including expenses) based on 36.50 hours of attorney time at $165.00 and $200.00 per hour and 3 hours of paralegal time at $64.00 per hour.

The Employer has accepted the requested attorney's fee as reasonable in view of the benefits obtained, the itemized services and the hourly rate charged. (RX 8A)

In accordance with established practice, I will consider only those services rendered and costs incurred after June 23, 1999, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration.

In light of the nature and extent of the excellent legal services rendered to Claimant by her attorney, the amount of compensation obtained for Claimant and the Employer's comments on the requested fee, I find a legal fee of $6,993.29 (including expenses of $376.29) is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer shall pay Decedent's widow, Elizabeth Pringer, ("Claimant"), Death Benefits from November 9, 1995, based upon the National Average Weekly Wage of $391.22, in

accordance with Section 9 of the Act, and such benefits shall continue for as long as she is eligible therefor.

2. The Employer shall also reimburse or pay Claimant reasonable funeral expenses of $1,450.00, pursuant to Section 9(a) of the Act. (CX 3)

3. Interest shall be paid by the Employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Interest shall also be paid on the funeral benefits untimely paid by the Employer.

4. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Decedent's work-related injury referenced herein may have required between September 5, 1995 and November 9, 1995, subject to the provisions of Section 7 of the Act.

5. The Employer shall pay to Claimant's attorney, Embry and Neusner, the sum of $6,617.00 (including expenses) as a reasonable fee for representing Claimant herein before the Office of Administrative Law Judges between July 15, 1999 and June 8, 2000.

_____
DAVID W. DI NARDI
Administrative Law Judge

Dated:

Boston, Massachusetts
DWD:jl